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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 530

ROBERT PAGE WRIGHT, BANKRUPT,
Petitioner,

vs.

VINTON BRANCH OF THE MOUNTAIN TRUST BANK OF ROANOKE, VIRGINIA, AND A. C. HARRIS, TRUSTEE.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Robert Page Wright, a resident of the county of Bedford, in the State of Virginia, respectfully shows that he is aggrieved by an order of the Honorable United States Circuit Court of Appeals for the Fourth Circuit, entered on the 6th day of October, 1936 (R. 31-32), affirming an order of the District Court of the United States for the Western District of Virginia, declaring unconstitutional Subsection (s) of Section 75 of the National Bankruptcy Act, as amended by the Act of Congress of August 28, 1935, c. 792, Sec. 6, 49 Stat. 942; Title 11, U. S. C. A.

203 (s), known as the Amended Frazier-Lemke Moratorium Act, and petitioner files this his petition for a writ of certiorari to review the proceedings had in said United States Circuit Court of Appeals for the Fourth Circuit.

Petitioner files herewith a certified transcript of the record in said case, together with a supporting brief as required by the Rules of this Honorable Court.

I. Summary and Short Statement of the Matter Involved.

Petitioner's case is one of six cases, heard together (R. 23, *et seq.*), and, employing the language of the opinion of the learned United States Circuit Court of Appeals (R. 26):

> "The appeals were heard together in this Court and together they present but one question, *i. e.*, the constitutional validity of the amended Frazier-Lemke Act."

The learned Senior Circuit Judge (Parker), who delivered the opinion of the United States Circuit Court of Appeals for the Fourth Circuit, has made marginal quotation of the pertinent clauses of the Act (Section 75, subsection (s), of the National Bankruptcy Act) in his opinion (R. 27, *et seq.*), to which petitioner now makes reference.

The following quotation from petitioner's petition for composition or extension of time, etc., will suffice to present the peculiar facts of petitioner's case (R. 1 and 2):

> "Your petitioner, Robert Page Wright, fifty-two years of age, who is a resident of the County of Bedford, in the Western District of the State of Virginia, residing on his farm, situate about one-half mile from the village known as Old Stewartsville, represents to Your Honor as follows:
>
> "That he is a farmer, operating and owning, subject to liens, a tract of land containing about fifty-nine acres in one body of land; that he is unable to meet his debts as they mature; that, his said real estate

would under normal economic conditions be worth substantially more than the amount of his obligations, but that said property, under the existing conditions, would probably bring substantially less than his obligations, and that, in this sense, petitioner represents that he is insolvent, or unable to meet his debts as they mature, and that it is desirable to effect a composition or an extension of time to pay his debts.

"Petitioner further represents that he is fifty-two years of age, that he is married, that his wife, Girtie F. Wright, resides with him in the Mansion House on said farm; that petitioner and his said wife have four children, three of whom are above the age of twenty-one years. Two of said children reside with petitioner who for three years has been incapacitated for active work by reason of invalidism—heart affection."

The case was referred to the Conciliation Commissioner (R. 6). A meeting of the creditors was called at which the debtor made a written proposal for extension of the time for payment of his debts, specially asking time for the marketing of valuable boxwood on his premises (R. 6, *et seq.*).

The Conciliation Commissioner reported to the District Court that the creditors declined to accept the debtor's proposal for extension (R. 9), and the learned District Court entered an order (R. 9) providing that the proceedings should be dismissed unless within fifteen days the debtor should file his petition praying to be adjudged a bankrupt under Section 75, Subsection (s), as amended by the Act of August 28, 1935.

Petitioner filed his amended petition under said last mentioned section, praying to be adjudged a bankrupt, and praying that he might have all the benefits of said section (R. 10); and petitioner was by order of said District Court adjudged a bankrupt, and the case was referred back to the Conciliation Commissioner for proceedings under said

Subsection (s) of Section 75 of the Bankruptcy Act, as amended (R. 12).

The Vinton Branch of the Mountain Trust Bank having moved to dismiss the proceedings "upon the ground that Subsection (s) of said Act is unconstitutional in that it deprives said creditor of its property without due process of law," by order entered January 8, 1936 (R. 13), the motion was granted, and the proceedings were terminated.

From this order petitioner was allowed an appeal by the United States Circuit Court of Appeals for the Fourth Circuit, 1936 (R. 18), on assignment of errors duly filed (R. 14). The case having been argued, the learned United States Circuit Court of Appeals for the Fourth Circuit in an opinion (set forth in full, R. 26, *et seq.*) affirmed the learned District Court's judgment holding the said Act unconstitutional, and entered its order accordingly (R. 31-32).

II. **Reasons Relied Upon for Granting the Writ of Certiorari.**

(a) In the case of *Dallas Joint Stock Land Bank of Dallas, Texas* v. *Davis,* 83 F. (2d) 322, the United States Circuit Court of Appeals for the Fifth Circuit decided May 5, 1936, Subsection (s) of Section 75 of the National Bankruptcy Act was declared constitutional; while in the case of *United States National Bank of Omaha* v. *Pamp,* United States Circuit Court of Appeals for the Eighth Circuit, 83 F. (2d) 493, decided May 11, 1936, and in the case of *Lafayette Life Insurance Co.* v. *Lowman,* Circuit Court of Appeals for the Seventh Circuit, 79 F. (2d) 887, the same Act was declared unconstitutional.

And there is a yet wider variance in the decisions of the District Courts of the United States, as petitioner will show in his supporting brief.

There are, in addition, several cases now pending, and undecided, in the United States Circuit Courts of Appeals for other Circuits. Thus conflicting decisions throw the law into confusion and call for an authoritative final deliverance by the Supreme Court.

(b) Further, petitioner is advised that the decisions against the constitutionality of said amended Subsection (s) of Section 75 of the National Bankruptcy Act are probably untenable, or are in conflict with the weight of authority, from the standpoint of the applicable decisions of the Supreme Court of the United States; that all of the decisions of the Federal courts of inferior jurisdiction as to the constitutionality of said Act, whether pro or contra, constitute decisions of an important question of Federal law, which has not been, but should be, settled by this Honorable Court; and that all such decisions against the constitutionality of said Amended Frazier-Lemke Act are probably in conflict with applicable decisions of this Honorable Court.

(c) That, aside from all other considerations, property rights running into vast sums of money, affecting with uncertainty and with suspense both creditor and debtor, and arising in every section, almost in every locality, of the Nation, are involved in the administration of the Act under consideration, and that the necessity for one uniform statement of the law is not only apparent, but is an economic necessity.

WHEREFORE, petitioner prays that a writ of certiorari may issue under the seal of this Honorable Court in this cause, directed to the Honorable United States Circuit Court of Appeals for the Fourth Circuit, commanding said Court to certify and transmit to this Honorable Court, in manner and form as provided by law, a complete tran-

script of the record and all proceedings had in said Circuit Court of Appeals in this cause, to the end that this cause may be reviewed and determined by this Honorable Court, and that petitioner may be granted such other and further relief as his case may entitled him to, or as to equity shall seem meet.

And petitioner will ever pray.

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Errors Complained of.

Is the Amended Frazier-Lemke Act, Sec. 75, Subsection (s), Bankruptcy Act, constitutional? (Act of Congress August 28, 1935, Sec. 6, 49 Stat. 942; 11 U. S. C. A., Sec. 203 (s).)

For Assignment of Errors in the Court below, see Record, page 14.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Matter Involved.

For statement of the facts and proceedings reference is made to the petition for writ of certiorari and to the copy of the Record filed therewith.

The Sole Question Presented.

Is the Amended Frazier-Lemke Moratorium Act constitutional? The Act in question is Subsection (s) of Section 75 of the National Bankruptcy Act, as amended by Act of Congress dated August 28, 1935, Sec. 6, 49 Stat. 942; 11 U. S. C. A., Sec. 203 (s).

The text of the Act is set forth in the margin of the opinion of the learned Circuit Court of Appeals. The opinion of the court will be found in the Transcript of Record, p. 26, *et seq.*

The Two Opinions of the Learned Circuit Court of Appeals for the Fourth Circuit.

The original Subsection (s) of Section 75 of the National Bankruptcy Act, known as the original Frazier-Lemke Act, the provisions of which, we assume no one will deny, were far more drastic and radical from a constitutional outlook than are the provisions of the Amended Act, was upheld and declared constitutional by the Circuit Court of Appeals for the Fourth Circuit in an exhaustive opinion by Judge Parker in the case of *William W. Bradford, Jr., Bankrupt, Appellant*, v. *Michael W. Fahey, Assignee, et al.*, 76 F. (2d) 628. Subsequently, the Supreme Court of the United States having declared the original Frazier-Lemke Act unconstitutional in the case of *Louisville Joint Stock Land Bank* v. *William W. Radford, Sr.*, 295 U. S. 555, on petition for rehearing filed in the above mentioned case of *Bradford* v. *Fahey*, the previous decision was set aside and the court below (the District Court of the United States for the District of Maryland) was affirmed. 77 F. (2d) 992.

In the case at bar, the *Robert Page Wright* case, which arises under the Amended Act, the learned Court, expressly referring to the controlling precedent of the *Radford* case, in a brief opinion holds the Amended Frazier-Lemke Act unconstitutional.

Petitioner respectfully contends that the Amended Frazier-Lemke Act with studied purpose, takes note of, and corrects, all of the unconstitutional features of the original Frazier-Lemke Act, and that, therefore, the learned Circuit Court of Appeals for the Fourth Circuit erred in declaring the Amended Act unconstitutional.

Argument.

We have had access to some briefs on each side of the question at issue which may, without exaggeration, be styled learned briefs. But it seems to us that these briefs, because they enter fields of discussion that have no logical relation to the question now presented, tend to becloud rather than to illumine discussion.

Unless we misconceive the issue, it lies within a narrow compass. Therefore, we shall seek to avoid entering this wide field of research, of argument, and of citation. It is our view that every postulate of law which bears upon the case at bar is wrapped in the opinion of Mr. Justice Brandeis delivered in the case of *Louisville Joint Stock Land Bank* v. *Radford, supra,* read in the light of a very few other decisions of the Supreme Court of the United States, to which we shall advert. To these cases we shall confine ourselves.

Our discussion will deal with two generic inquiries:

First. To what principles of law, cognate to this subject, has the learned United States Supreme Court tied itself?

Second. Has the Congress, in revising the new Frazier-Lemke Act, brought the Act within the law as declared by the Supreme Court?

We maintain that the amended Subsection (s) of Section 75 of the National Bankruptcy Act is constitutional; that it does violence to not one section of the Constitution; that it is a legitimate exercise of the Congressional prerogative; tersely granted by Subsection 4 of Section 8 of Article 1 of the Constitution:

> "To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States."

To support our argument we shall, first, seek to present the law as settled in the *Radford* case, that is to say, to what extent Congress may go within the limit of the Constitution; and, second, to discover whether the amended Frazier-Lemke Act (Subsection (s) of Section 75) inveighs against any principle announced in the *Radford* case.

We submit that the United States Supreme Court has in effect already sanctioned the amended Frazier-Lemke Act.

This anticipatory sanction is found in the case of *Home Building and Loan Association* v. *Blaisdell,* 290 U. S. 398.

This is the *Minnesota Moratorium* case, in which the order of the Supreme Court of Minnesota declaring a two-year moratorium statute valid was affirmed by the United States Supreme Court.

The syllabus of the Court's opinion very accurately reflects the holdings of the Court found in the text. Numerous propositions are laid down; but the gist of the decision is found in paragraphs 6 and 7 of the syllabus. We quote these:

> "6. The obligation of a contract is not impaired by a law modifying the remedy for its enforcement but not so as to impair substantial rights secured by the contract.
>
> "7. Decisions of this court in which statutes extending the period of redemption from foreclosure sales were held unconstitutional do not control where the statute in question safeguards the interests of the mortgagee-purchaser by conditions imposed on the extension."

Is not the amended Frazier-Lemke Act but an adaptation and an expression of this principle?

We shall herein assume to demonstrate from an analysis of the text of this Act that it does "safeguard the interests of the mortgagee-purchaser".

On the other hand the case of *W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56, well illustrates, from the standpoint of the United States Supreme Court's holding, the points of differentiation between a reasonable moratorium statute, as in the *Blaisdell* case, involving the Minnesota Moratorium statute, and an unreasonable and unconstitutional statute, as in the case of *Worthen Co.* v. *Kavanaugh,* involving an Arkansas statute.

With respect to these two cases the Supreme Court has this to say in its opinion in the case of *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 578:

> "Since entry of the judgment of the Court of Appeals, this court has held unconstitutional provisions of state legislation in some respects comparable to the Frazier-Lemke Act. W. B. Worthen Co. *v.* Kavanaugh, 295 U. S., page 56. There we said:
>
> "'With studied indifference to the interests of the mortgagee or to his appropriate protection they have taken from the mortgage the quality of an acceptable investment for a rational investor'; and, 'So viewed they are seen to be an oppressive and unecessary destruction of nearly all the incidents that give attractiveness and value to collateral security.'"

And, again, on page 581 of the opinion in the *Radford* case:

> "Statutes for the relief of mortgagors, when applied to pre-existing mortgages, have given rise, from time to time, to serious constitutional questions. The statutes were sustained by this Court when, as in Home Building and Loan Association *v.* Blaisdell, 290 U. S. 398, they were found to preserve substantially the right of the mortgagee to obtain, through application of the security, payment of the indebtedness. They were stricken down, as in W. B. Worthen Co. *v.* Kavanaugh, 295 U. S. 56, when it appeared that this substantive right was substantially abridged. Compare W. B. Worthen Co. *v.* Thomas, 292 U. S. 426."

Yet, again, in the *Radford* case (295 U. S. 597), the Supreme Court says:

> "Home Building & Loan Assn. *v.* Blaisdell, 290 U. S. 398, upon which Radford relies, lends no support to his contention. There the statute left the period of the extension of the right of redemption to be determined by the court within the maximum limit of two years. Even after the period had been decided upon, it could, as was pointed out, 'be reduced by order of the court under the statute, in case of a change in circumstances, * * *' (p. 447); and at the close of the period, the mortgagee was free to apply the mortgaged property to the satisfaction of the mortgage debt. Here, the option and the possession would continue although the emergency which is relied upon as justifying the Act ended before November 30, 1939."

It seems incontrovertible from a studied consideration and comparison of the opinions in the three above cited cases, namely, the *Blaisdell* case, involving the Minnesota statute, the *Kavanaugh* case, involving the Arkansas statute, and the *Radford* case, involving the original Frazier-Lemke Act, that clear cut rules of law emerge fully sanctioned by our Highest Court. These rules are very simple and easily understood. They are:

(1) That economic emergencies, while not creating constitutional power, may furnish occasion for the exercise of constitutional power already possessed.

(2) That a reasonable moratorium modifying a creditor's remedy, without impairing the creditor's substantial rights, is constitutional.

(3) That a statute or an act of Congress which takes valuable rights in specific property from one person and arbitrarily and without due process of law gives such property rights to another person, is unconstitutional.

It seems to us transparently clear that the amended Frazier-Lemke Act falls within the principles announced in the case of *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, and not within the principles laid down in the *Kavanaugh* and *Radford* cases, *supra;* and that, therefore, the present Subsection (s) of Section 75 of the National Bankruptcy Act is constitutional.

A recent decision of the United States Supreme Court which, we think, has a very logical and controlling bearing upon the case at bar is the case, or, to be more accurate, the cases (Nos. 479 to 490, inclusive, October Term, 1934) of *Continental Illinois National Bank & Trust Co. of Chicago,* and related cases v. *The Chicago, Rock Island & Pacific Railway Co. et al.,* decided April 1, 1935. 294 U. S. 648.

This proceeding was under Section 77 of the National Bankruptcy Act. This section may be regarded as a companion piece to Subsection (s) of Section 75 of the Bankruptcy Act, both Acts having been born of the depression; Section 77 having been designed to give relief to railroad corporations similar, with appropriate adaptations, to the relief which Subsection (s) of Section 75 furnishes to financially distressed farmers.

With the opinion in these cases may be found a marginal quotation of "various excerpts from Sec. 77," as the learned co' t puts it. One has only to read the text of Section 77 to see that it permits, not only a moratorium of the most far reaching sort as to the enforcement of lien or other debts against the petitioning railroad corporation, but that it, in addition, permits the most radical readjustment of the railroad's indebtedness imaginable, without regard to the effect of such readjustment upon particular lien obligations which might claim protection under the Fifth Amendment and those other constitutional provisions commonly invoked—and all this with regard only to the preser-

vation from destruction, by foreclosure, of the railroad's properties under economic conditions which demanded legislative authority to the courts to intervene in the interest of society at large.

And this radical legislation the learned Supreme Court, in these cases of *Continental Illinois National Bank & Trust Co. et al.*, v. *Chicago, Rock Island & Pacific Railway Co.*, justified under the bankruptcy clause of the Constitution, the same clause which petitioner invokes in the instant case.

Let us illustrate the broad and radical provisions of Section 77 by the following quotation from page 661 of the court's opinion:

> "By the Act of March 3, 1933, c. 204, 47 Stat. 1467 original jurisdiction, in addition to that theretofore exercised in voluntary and involuntary proceedings to adjudge persons bankrupt, was conferred upon courts of bankruptcy 'in proceedings for the relief of debtors', as provided in Sections 74, 75 and 77 of the act. We are here concerned only with Section 77. That section contains provisions for the reorganization of railroads engaged in interstate commerce. It permits any railroad corporation which is insolvent or unable to met its debts as they mature to effect a plan of reorganization.
>
> "It provides for the filing of a petition by the railroad corporation in a court designated by the act. If the petition be approved, the court, during the pendency of the proceedings, is given exclusive jurisdiction of the debtor and its property wherever located. The act requires that the railroad corporation shall be referred to in the proceedings as a 'debtor,' and permits any corporation, the majority of the capital stock of which is owned, or substantially all of whose properties are operated, by the debtor under lease or operating agreement, also to file a petition in the same proceeding stating that it is insolvent or unable to meet its debts as they mature and that it desires to effect a plan

of reorganization in connection with the plan of the original debtor.

"Other provisions of the section direct that a plan of reorganization shall include a proposal to modify or alter the rights of creditors generally or of any class of them, secured or unsecured, either through the issuance of new securities or otherwise; that it shall provide adequate means for its execution; that the term 'creditor' includes 'all holders of claims, interests, or securities of whatever character against the debtor or its property'; and that, if the plan is not proposed or accepted or confirmed within a reasonable time to be fixed by the judge, he may dismiss the proceeding."

The court in the case now under consideration took occasion, *sua sponte*, to expound the history and the true meaning of the bankruptcy clause of the Constitution that has such intimate relation to our case as to justify liberal quotations from the opinion. First we quote from page 667, 294 U. S., as follows:

"First. The constitutional validity of the section in its general scope and application is not assailed, the subject being passed without discussion by any of the parties. Nevertheless, grave doubt has been expressed in respect of that question; and since the question is inherently fundamental, we deem it necessary to consider and dispose of it in limine—postponing, however, for later consideration the limited contention of the banks, in which the Reconstruction Finance Corporation seems not to join, that the due process clause of the Constitution is infringed by the special application made of Section 77 in respect of the injunction.

"Article I, sec. 8, cl. 4, of the federal Constitution vests Congress with the power 'to establish * * * uniform laws on the subject of bankruptcies throughout the United States'; and the simple question is—does Section 77 constitute a law on the subject of bankruptcies? * * * From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberaliza-

tion in respect of the operation of the bankruptcy power."

And again we quote from page 671 of this same opinion:

"By the act of 1867, as amended by the act of 1874, c. 390, Section 17, 18 Stat. 178, 182, the debtor for the first time was permitted, either before or after an adjudication in bankruptcy, to propose terms of composition to his creditors to become binding upon their acceptance by a designated majority and confirmation by the judge.

"The fundamental and radically progressive nature of these extensions becomes apparent upon their mere statement; but all have been judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution. Taken altogether, they demonstrate in a very striking way the capacity of the bankruptcy clause to meet new conditions as they have been disclosed as a result of the tremendous growth of business and development of human activities from 1800 to the present day. And these acts, far-reaching though they be, have not gone beyond the limit of congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed.

"Section 77 advances another step in the direction of liberalizing the law on the subject of bankruptcies. * * * Equity receiverships, resorted to for that purpose, have never been satisfactory for many reasons. Partly, no doubt, in recognition of that situation, Congress, by Section 77, added railroad corporations to the category of those who might have relief by legislation passed in virtue of the bankruptcy clause of the Constitution; and determined, after consideration, that such relief to be effectual should take the form of a reorganization, and should extend to cases where the corporation is 'unable to meet its debts as they mature'. The last phrase, since it is used as an alternative for the word 'insolvent', obviously means something less than a condition of 'bankruptcy' or 'in-

solvency' as those words are employed in the law. See Bankruptcy Act, Section 1 (15), which defines an 'insolvent' as one whose assets, at a fair valuation, are not sufficient to pay his debts. It may be construed to include a debtor who, although unable to pay promptly, may be able to pay if time to do so be sufficiently extended. Obviously, Section 77 does no more than follow the line of historical and progressive development projected by previous acts.

"* * * (page 673) The same view sustains the validity of Section 77. Both contemplate an adjustment of a failing debtor's obligations; and although actual bankruptcy may not supervene in either, they are none the less laws on the subject of bankruptcies. With due regard for consistency, the constitutional validity of the one cannot well be sustained and that of the other denied, as this court quite evidently recognized in Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527."

"It follows, from what has now been said, that Section 77, in its general scope and aim, is within the power conferred by the bankruptcy clause of the Constitution; and we so hold."

A further important principle which bears upon our case was adjudicated in the case now under discussion, namely:

"IF A FEDERAL COURT OF EQUITY MAY BY INJUNCTION STAY A FORECLOSURE, WHY MAY NOT A BANKRUPTCY COURT OF EQUITY STAY A SALE BY MORATORIUM UNDER AN ACT OF CONGRESS?

We are still discussing this case of the *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island and Pacific Railway Co.*, 294 U. S. 648.

In that case it was sought to foreclose, or sell, certain collateral securities. In the opinion of the Court, page 675, the following question is asked:

"Under Section 77 does the bankruptcy court have authority to enjoin the sale of the collateral here in

> question if a sale would so hinder, obstruct and delay the preparation and consummation of a plan of reorganization as probably to prevent it?"

The principle brought up by this judicial inquiry is, we submit, in essence very similar to the principle involved in the amended Frazier-Lemke Act, that is, whether a court of bankruptcy has the constitutional power under Sub-section (s) of Section 75 of the Bankruptcy Act to grant a moratorium. What difference is there in essence between the right of a court of equity, acting as a bankruptcy court, to enjoin the sale of collateral securities, and the right of a court of bankruptcy, acting not only as a court of original equity jurisdiction, but acting under the express authority of an Act of Congress, to stay the sale of real property sought to be foreclosed under a mortgage? In each case the proceeding is sought to be had under an agreement whereby the debtor has agreed, upon his default in the payment of the debt, that his property may be foreclosed, or sold, pursuant to the terms of the particular written instrument. The written instrument may be a collateral note, or a collateral agreement, or it may be a deed of trust. But the principle is the same in each case, and the principle in each case involves the right or the power of a court of equity to stay foreclosure proceedings.

In the above mentioned case of the *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island and Pacific Railway Co.*, the Supreme Court upheld the jurisdiction of a bankruptcy court to enjoin the sale of collateral securities for the reason that such sale might interfere with the consummation of a plan for the reorganization of the railroad under the provisions of Section 77 of the National Bankruptcy Act. Let us quote pertinent parts of the opinion, page 676:

> "The bankruptcy court, in granting the injunction, was well within its power, either as a virtual court of

equity, or under the broad provisions of Section 2 (15) of the Bankruptcy Act or of Section 262 of the Judicial Code.

"The injunction does not infringe Section 67 (d), U. S. C. Title 11, Section 107 (d). The substance of that provision is that bona fide liens shall not be affected by anything contained in the Bankruptcy Act. The injunction here in no way impairs the lien, or disturbs the preferred rank of the pledgees. It does no more than suspend the enforcement of the lien by a sale of the collateral pending further action. It may be, as suggested, that during the period of restraint the collateral will decline in value; but the same may be said in respect of an injunction against the sale of real estate upon foreclosure of a mortgage; and such an injunction may issue in an ordinary proceeding in bankruptcy. Straton *v.* New, 283 U. S. 318, 321, and cases cited. A claim that injurious consequences will result to the pledgee or the mortgagee may not, of course, be disregarded by the district court; but it presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised. So far as constitutional power is concerned, there is no difference between an injunction restraining the enforcement of a real-estate mortgage and one restraining the enforcement of a pledge by the sale of collateral security. Such differences as exist affect not the power but the propriety of its exercise—that is to say, the discretion of the court. Such an injunction, as just indicated, is within the contemplation of Section 77, and we need not inquire whether it would be admissible under the act in force prior to the adoption of that section."

And again, we quote from page 680 of the opinion in this case:

"We find no substance in the contention of the petitioning banks that Section 77, as applied by the court below to permit an injunction restraining the sale of

the collateral, violates the Fifth Amendment. The basis of the contention is that since, by the terms of the pledge, the pledgors are empowered on default to sell the collateral at such times as they may select. Section 77, as thus applied, deprives them of their property—that is to say, impairs or destroys their contractual rights—without due process of law. * * * Speaking generally, it may be said that Congress, while without power to impair the obligation of contracts by laws acting directly and independently to that end, undeniably, has authority to pass legislation pertinent to any of the powers conferred by the Constitution however it may operate collaterally or incidentally to impair or destroy the obligation of private contracts. Legal Tender Cases, supra; Louisville & Nashville R. R. *v.* Mottley, 219 U. S. 467, 480-482, 484; Highland *v.* Russell Car Co., 279 U. S. 253, 261. And under the express power to pass uniform laws on the subject of bankruptcies, the legislation is valid though drawn with the direct aim and effect of relieving insolvent persons in whole or in part from the payment of their debts. See Hanover National Bank *v.* Moyses, *supra,* at p. 188. So much necessarily results from the nature of the power, and this must have been within the contemplation of the framers of the Constitution when the power was granted.

"The injunction here goes no further than to delay the enforcement of the contract. It affects only the remedy. As already appears, this court has upheld the power of a court of bankruptcy to stay the enforcement of the remedy under a real-estate mortgage; and the remedy under a pledge, so far as constitutional power is here concerned, presents a situation strictly analogous in character."

We are unable to perceive why all of the foregoing reasoning does not apply with equal force to the provisions of Subsection (s) of Section 75. And, indeed, with greater force, because, as we have before suggested, Subsection (s) of Section 75 adds to the equity jurisdiction under the

Bankruptcy Act the express mandate of an Act of Congress.

From this outlook upon the law we proceed to the question above propounded, namely: Has the Congress, in revising the new Frazier-Lemke Act, brought the Act within the law as declared by the Supreme Court? In other words:

Whether the amended Frazier-Lemke Act meets and mends the objections of the United States Supreme Court in declaring unconstitutional the original Frazier-Lemke Act.

The answer to this question involves other inquiries.

(1)

IN WHAT RESPECT WAS THE ORIGINAL FRAZIER-LEMKE ACT HELD UNCONSTITUTIONAL?

It seems that the gist of the vulnerability of the original ubsection (s) resided in Paragraph seven (7) thereof, hich paragraph we quote:

> "(7) If any secured creditor of the debtor, affected thereby, shall file written objections to the manner of payments and distribution of debtor's property as herein provided for, then the court, after having set aside the debtor's exemptions as prescribed by the State law, shall stay all proceedings for a period of five years, during which five years the debtor shall retain possession of all or any part of his property, under the control of the court, provided he pays a reasonable rental annually for that part of the property of which he retains possession; the first payment of such rental to be made within six months of the date of the order staying proceedings, such rental to be distributed among the secured and unsecured creditors, as their interests may appear, under the provisions of this Act. At the end of five years, or prior thereto, the debtor may pay into court the appraised price of

the property of which he retains possession: *Provided,* That upon request of any lienholder on real estate the court shall cause a reappraisal of such real estate and the debtor may then pay the reappraised price, if acceptable to the lien holder, into the court, otherwise the original appraisal price shall be paid into court and thereupon the court shall, by an order, turn over full possession and title of said property to the debtor and he may apply for his discharge as provided for by this Act; *Provided,* however, That the provisions of this Act shall apply only to debts existing at the time this Act becomes effective.

"If the debtor fails to comply with the provisions of this subsection the court may order the trustee to sell the property as provided in this Act."

THE SUPREME COURT'S CRITICISM OF PARAGRAPH (7) OF THE ORIGINAL FRAZIER-LEMKE ACT.

We quote the concluding sentences from the learned Supreme Court's opinion in the *Radford* case by way of stating the essence of the Court's criticism of Paragraph (7), and the basis of the Court's decision:

"The province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value. Compare Ochoa *v.* Hernandez, 230 U. S. 139, 161; Loan Association *v.* Topeka, 20 Wall. 655, 662, 664; In re Dillard, Fed. Cas. No. 3,912, p. 706. As we conclude that the Act as applied has done so, we must hold it void. For the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

(2)

WHAT ARE THE PROVISIONS OF THE FIFTH AMENDMENT?

The part of the Fifth Amendment here involved is:

> "Nor shall * * * (any person) be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation."

(3)

IN WHAT WAY DOES THE AMENDED SUBSECTION (s), THE NEW FRAZIER-LEMKE MORATORIUM ACT, DEPRIVE ANY PERSON OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW, AND THUS CONTRAVENE THE FIFTH AMENDMENT?

There can be no comparison of the language of the original Paragraph (7) of Subsection (s) with the language of the amended Subsection (s), for the reason that there is no Paragraph (7) in the amended Subsection (s). There are only six paragraphs in the amendment. But the whole of the original Subsection (s) has been amended, and with a manifest purpose on the part of Congress to throw about the vested property rights of the creditor every constitutional safeguard to which such creditor might be entitled under the *Radford* decision.

Let us see if Congress has accomplished what it set out to do, that is, in good faith to meet the letter and the spirit of the decision of the highest tribunal of the Federal judicial system. We now enumerate:

1. The first paragraph of Subsection (s) provides, as formerly, for an appraisal of the debtor's property, upon failure to effect a composition or extension. But the creditor is expressly given the right to except to the appraisal, and to appeal therefrom within four months.

2. Paragraph (1) also provides that the debtor shall have possession of the appraised property, "under the supervision and control of the court". But Paragraph (1) further provides:

> "All such existing mortgages, liens, pledges, or encumbrances shall remain in full force and effect, and the property covered by such mortgages, liens, pledges, or encumbrances shall be subject to the payment of the claims of the secured creditors, as their interests may appear."

3. Paragraph (2) provides for a three-year moratorium, the debtor to retain possession of the property during this period, but "*in the custody and under the supervision and control of the court*", and with the added proviso that he shall pay a reasonable rental for the property, which rental shall be "*the usual customary rental in the community where the property is located,* based upon the rental value, not income and earning capacity of the property".

And this further provision in the new Act is of special significance:

> "*The Court, in its discretion, if it deems it necessary to protect the creditors from loss by the estate, and/or to conserve the security, * * * may, in addition to the rental, require payments on the principal due and owing by the debtor to the secured, or unsecured creditors, as their interests may appear,*" etc.

We have italicized certain words in Paragraph (2), in particular the last quoted words, in order to bring out their transcendent bearing upon the spirit of protection afforded the creditor in this Amended Act. The provision whereby the court may require payments on account of principal, in addition to the rental, absolutely assures the creditor that his investment will be safeguarded as far as may be humanly possible in the sound discretion of the court of equity.

Could any creditor reasonably ask more? Could any law reasonably provide for more?

4. Paragraph (3) provides that at the end of three years the debtor may pay into court a sum equal to the appraised value of the land, subject to credits; but

(a) Any creditor, secured or unsecured, or the Court of its own motion, may, after hearing evidence, order a reappraisal; or, after a hearing, the court may itself fix the value of the property, whereupon the debtor shall pay the value thus arrived at; and

(b) Further, it is provided that "upon request in writing by any secured creditor or creditors, the court shall order the property upon which such secured creditors have a lien to be sold at public auction"—and further, the court may order a sale if the "debtor at any time fails to comply with the provisions of this section, or with any orders of the court made pursuant to this section, or is unable to refinance himself within three years."

5. And, finally, Paragraph (6) provides:

> "(6) This Act is hereby declared to be an emergency measure and if in the judgment of the court such emergency ceased to exist in its locality, then the court, in its discretion, may shorten the stay of proceedings herein provided for and proceed to liquidate the estate."

DOES THE CONSTITUTION OFFER NO PROTECTION TO A DEBTOR?

This question has a pertinent and a solemn relationship to the foregoing analyses which we have undertaken to make of the *Radford* case and of the amended Act designed, if we may use the term, to synchronize the statute law with the law as declared by the learned Supreme Court.

Let us meet the question propounded in the caption without evasion. That we may make answer to this question in

its relation to the precise issue under discussion let us take soundings that we may know to what point we have come in our discussion.

We submit that our analysis of the Amended Frazier-Lemke Act presents this Act as potentially a mere moratorium act, a stay law designed to enable the financially distressed farmer, beset by economic forces which have, without his fault or contriving, and with a universal sweep, evaporated the value of his land, of the products of his farm, of his live stock, of his all, driving him into bankruptcy, to have a breathing spell, to have the opportunity to recoup his losses in a hoped-for period of reacting values, to the end that he may retain his home, a shelter for his family—at least until, if the worse comes to the worst, he may make new adjustments in life.

Our position, stated precisely as we conceive it, is that this Amended Act, in the efforts of its framers to assure its constitutionality, has in it far more of protection for the creditors than it has for the debtor. The utmost that it does for the farmer debtor is to grant to him a three-year moratorium. But even this concession is subject either to modification by the court or to veto by the creditor.

Let us explain. If the debtor is granted a three-year moratorium, here is what may happen to him at any time during the three years:

(a) His property may be sold at any time during the moratorium if he defaults in performing any of the conditions laid upon him by the court.

(b) He may be called upon by his creditors to face a new appraisal if the first appraisal is deemed too low in amount.

(c) He must pay a reasonable rental for his farm during this three-year term.

(d) He must make payments on the principal debt, in addition to his rental, if the creditors so demand, and the court shall so decree.

(e) At the termination of his period of moratorium his creditors may call for a new appraisal and the debtor must settle on the basis of such appraisal or stand eviction.

(f) And, finally, at any time, the court may decree that the emergency has ceased upon which the three-year moratorium was granted—and "proceed to liquidate the estate".

We do not speak lightly, but literally, when we say that one has but to analyze this so-called moratorium Act to discover that in it, so far from violating the "vested rights" of the creditor, the farmer has been granted no absolute right at all. The Act does not even guarantee him a moratorium. It positively gives him nothing, for in every instance it gives with one hand and takes away with the other.

If the Act gives him three years' stay in one paragraph, in another it permits the court to take it away. If the Act provides for a rental in one paragraph, it provides in the same paragraph that the court may require payments on the principal debt at any time. And if in one paragraph it provides for an appraisal as a basis for purchase and for rental, in another paragraph it provides for a new appraisal at the request of creditors when the time for settlement comes; or the court may at such time of its own motion fix a new value. And, finally, at the request of a secured creditor the court may, after all, order that the property be sold at public auction, whereupon the debtor, thus battle-doored and shuttle-cocked around by this wild-eyed, long-haired Act, as many would have us regard it, may be required to redeem it at the auction price, with five per cent interest.

In other words, we deliberately contend that the utmost, in last analysis, that the farmer-debtor gets out of this

much-berated Act is to be put, to employ a phrase used in simpler and better days than these, "on praying ground and pleading terms" with a court of equity. For, verily, this entire Amended Act confers not one vested right, not one arbitrary remedy, upon the farmer. It merely gives him the right to throw himself upon the conscience of a court of equity as his shelter in this time of storm.

And, again, we point out that this so-called unconstitutional Act does not even confer upon a bankruptcy court, which is a court of equity, as much discretion or authority as that same court has in its own inherent equity jurisdiction in cases of railroad receiverships. For illustration, in the *Seaboard Air Line Receivership* case a Virginia Federal Court has not only stayed proceedings for six years (so far), but has decreed the issuance of $15,000,000 of Receivers' Certificates, and has demoted many first mortgages to the status of second mortgages, in order that these Receivers' Certificates might have priority. It seems inconsistent that this long established jurisdiction which has grown up in Federal courts, without statutory origin or authority, should go unquestioned, while under the broad authority of the bankruptcy clause an Act of Congress, less radical than the power long exercised by courts, should be challenged as unconstitutional.

We put this question to those who put the present Act under the ban for unconstitutionality:

Assuming, and this we assert, that there is not one right given, or concession made, to the farmer in this Act which either may not be vetoed by the lien creditors or by them submitted to the Court for judicial determination, upon what ground can it be claimed that the Act contravenes the Fifth Amendment to the Federal Constitution? The Fifth Amendment assures the citizen that he shall not be deprived of his property without due process of law.

Is not every so-called right accorded the debtor subject to challenge by the lien creditor? May he not invoke a judicial determination of every concession made to the debtor? If then the creditor is assured his day in court on every right accorded the debtor, how can the creditor claim lack of due process?

And, if the Fifth Amendment be invoked to assure the lien creditor that he shall not be deprived of his vested property rights by reason of his mortgage, how is he hurt here? For may not the creditor first call for a termination of the moratorium on the ground that the emergency has passed? And may he not then call for a foreclosure by sale at public auction? We ask again, how is the creditor hurt?

No one will deny that under the Bankruptcy Act a debtor owing one hundred thousand dollars, and owning only two thousand dollars in assets, may, in Virginia, have all his property set aside as his homestead exemption and yet be discharged from all his debts. If an Act of Congress can permit this under the bankruptcy clause of the Constitution, why may not an act be sustained which does not relieve a man of his debts, but merely gives him time within which to pay them?

Conclusion.

We have endeavored to demonstrate that the Amended Frazier-Lemke Act has in fact, as was the intention of its framers, brought the statute law in harmony with the spirit and the ruling found in the opinion of Mr. Justice Brandeis in the *Radford* case. The gist of the element of unconstitutionality of the first Act, as found in the *Radford* case, was, as we see it, not that the first Act granted a moratorium, but that it denied to the mortgagee his right in the specific property, that it denied him the right to call for a sale of the property and to become a bidder at such sale, and that the Act, further, tied the hands of the court

so that its discretion could not be exercised for the protection of the trust subject.

We think it clear that the Supreme Court did not intend to deny to Congress the power under the bankruptcy clause of the Constitution to declare a moratorium in favor of distressed debtors during the period of the depression, provided care was taken to give judicial protection to the rights of the creditor in the specific property.

And we submit that the spirit and intent of the Radford decision has been met by the Amended Frazier-Lemke Act. We further submit that, in order to bring into harmony the law upon this subject the *Radford* case must be read in connection with the *Blaisdell* case and the case of the *Continental Ill. Nat'l Bank & Trust Co.* v. *Chicago, Rock Island and Pacific Ry. Co.*, both of which last named cases are cited in the opinion of Mr. Justice Brandeis in the *Radford* case.

And, finally, we submit that these three cases together present in clear outline the compass of the law, and that the Amended Frazier-Lemke Act does not contravene the law as thus proclaimed by the Honorable Supreme Court of the United States, but that it presents a sound, a salutary, and a harmonious application of the law to the case of the farmer in financial distress.

And petitioner submits that the failure of the learned Circuit Court of Appeals for the Fourth Circuit to sustain this Act is reversible error.

Respectfully,

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APPENDIX.

The following cases support the constitutionality of the amended Frazier-Lemke Act:

Dallas Joint Stock Land Bank v. *Davis* (5th Circuit C. C. A.), May 5, 1936, paragraph 3999, Bankruptcy Law Service;

In re Loop, Western District, Pennsylvania, May 1, 1936, Bankruptcy Law Service, paragraph 4001;

In re Slaughter, Northern District, Texas, 12 Fed. Supp. 206, Bankruptcy Law Service, paragraph 3621;

In re Reichert, Western District, Kentucky, 13 Fed. Supp. 1, Bankruptcy Law Service, paragraph 3777;

In re Bennett, Western District, Missouri, 13 Fed. Supp. 353, Bankruptcy Law Service, paragraph 3814;

In re Cole, Southern District, Ohio, 13 Fed. Supp. 283, Bankruptcy Law Service, paragraph 3813;

In re Williams, Northern District, Tennessee, Bankruptcy Law Service, paragraph 3705;

In re Allison, Eastern District, Illinois, Bankruptcy Law Service, paragraph 3876;

In re McCune, Western District, Pennsylvania, Bankruptcy Law Service, paragraph 3887;

In re Chilton, U. S. District Court Colorado, Bankruptcy Law Service, paragraph 4185.

In the opinion in *Dallas Joint Stock Land Bank* v. *Davis,* 5th C. C. A., Bankruptcy Law Service, paragraph 3999, Circuit Judge Hutcheson said: "Both committees (Senate and House Judiciary Committees) in recommending the bill for passage declared that the new subsection had been written so as to conform to the decision of the Supreme Court and that they felt that it did conform. We think it not a strained construction to hold that it does.

"On its face the Act merely transfers the liquidation of the indebtedness from State courts to the court of bankruptcy. It remits to the judicial discretion of that court the administration of the property of a bankrupt, with the end in view to bring about, if a due regard for the property rights and interests of his creditors permits it, a gradual and therefore more just and equitable liquidation, in lieu of an unduly hasty and forced one."